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No. 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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STATUTES:

National Bank Act Amendments of 1927 (McFadden Act), Pub. L. No. 69-639, 44 Stat. 1224

§ 7(f) (now codified at 12 U.S.C. § 36(f)) ....*passim*

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If a national bank facility does not fall within the McFadden Act's definition of "branch," it may be located "anywhere (even across state lines)." *E.g., Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). With this maxim in mind, Security Pacific National Bank's ("Security Pacific") petition and that of the Solicitor General present the important question whether national bank facilities which presently conduct a host of federally-authorized activities peripheral to the basic business of banking are outside the McFadden Act's "branch" definition, 12 U.S.C. § 36(f), and are therefore not subject to the Act's restrictions on the number and location of "branches."[1] In its Brief in Opposition, the Securities

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[1] The Solicitor General's petition on behalf of the Comptroller of the Currency ("Compt. Pet.") is captioned *Clarke v. Securities Industry Association*, No. 85-971. The Solicitor General's petition and that of Security Pacific ("Sec. Pac. Pet.") are supported by amicus curiae briefs filed by the American Bankers Association and the New York Clearing House Association.

Industry Association ("SIA") avoids addressing petitioners' arguments for granting a writ of certiorari, preferring instead to discuss the merits in a manner that obscures the flawed reasoning of the decisions below and distorts their far-reaching implications for the national banking industry. *See generally Securities Industry Association v. Board of Governors*, 104 S. Ct. 3003 (1984).

1. SIA's opposition ignores petitioners' contentions regarding the proper definition of "branch," instead assailing an argument petitioners did not make. According to the SIA, petitioners assert that the "branch" definition encompasses only those national bank facilities carrying on any of the three functions enumerated in the Act's "branch" definition (*i.e.*, receiving deposits, paying checks, or lending money). (*See* SIA Opp. at 4-6.) Petitioners argue nothing of the sort. Security Pacific has urged that "branches" should be identified by use of the "basic function" test embraced by the Second and Tenth Circuits. (*See* Sec. Pac. Pet. at 11-12.) Under that "basic function" test, which would have dictated a different result in the instant case, a national bank facility is a "branch" only if (1) it provides one or more basic banking services *of the nature* enumerated in the Act's definition of "branch" and (2) its operation would upset the federal-state bank competitive balance as to such basic banking functions. (*Id.*)

2. In contrast, SIA defends the "main office" test applied by the lower courts herein, under which a facility operated by a national bank would be deemed a "branch" if any of its activities, regardless of their nature, "may [be] conduct[ed] at [the bank's] main office." (*See id.* at 10 (quoting 577 F. Supp. at 260 (20a)).) This "main office" test renders the statute's definition of a "branch" meaningless because any activity a bank may conduct at a remote facility could, as a physical matter, also be conducted at its main office. Thus, the effect of the test is to transform every national bank facility, regardless

of function, into a "branch." (*See* Compt. Pet. at 17-18; Sec. Pac. Pet. at 10.) Apparently sensing that this position is inconsistent with its unavoidable concession that the McFadden Act does not restrict all national bank activities to "branches" (SIA Opp. at 6 & n.10), SIA seeks to recast the "main office" test, urging that bank activities "not involv[ing] public contact" would be exempt from the test's otherwise indiscriminate sweep. (*Id.* at 6.) In reality, the opinions below nowhere articulate such an exception.

3. In a similar vein, the SIA urges that the turmoil that would be created in the banking industry if the decision below became final would be minimal because under the lower courts' analysis, only those activities "aimed at attracting and servicing customers conveniently" would fall within the McFadden Act's "branch" definition. (SIA Opp. at 6.) Even if the decisions below did countenance such a "consumer convenience" test, it would be no more successful than the "main office" test in giving meaning to the Act's "branch" definition since all national bank services are in some way "aimed at attracting and servicing customers conveniently." Indeed, each of the current peripheral national bank activities enumerated in Security Pacific's petition as being jeopardized by the opinions below is intended immediately or eventually to enhance customer convenience.[2] Moreover, the "consumer convenience" test promoted by SIA is calculated to create a tool for generally inhibiting national bank competitiveness against non-bank entities (like the members of the SIA), a result inconsistent with the McFadden Act's limited purpose of regulating only

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[2] (*See* Sec. Pac. Pet. at 13-14.) SIA specifically suggests that its "customer convenience" test would place data processing services (which presumably would include such services as electronic credit card and check verification for merchants) outside the Act's "branch" definition. (SIA Opp. at 6.) In reality, such services are themselves peripheral activities presently offered by some national banks to attract and service customers.

certain elements of competition between federal and state banks. *See First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257-58 (1966).

4. Finally, the SIA urges that its standing to mount a McFadden Act-based challenge derives not from that statute, but from related banking legislation. (SIA Opp. at 7-9.) In other words, the SIA suggests that, even though it is not a party the McFadden Act is intended to benefit, it may fulfill the "zone-of-interests" standing requirement for bringing suit under that Act by reference to other legislation. (*Id.*) This position is wholly without merit. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). (*See also* Compt. Pet. at 23 n.18; Sec. Pac. Pet. at 22 n.27.) If not reversed, the standing ruling herein will prompt non-bank entities to exploit the erroneous McFadden Act interpretations below through a torrent of litigation seeking to extinguish competition from national banks in numerous activities peripheral to the basic business of banking.

For all of the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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